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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 402

NAOMI BROOKS, et al.,

Petitioners,

vs.

THE SCHOOL DISTRICT OF THE CITY OF MOBERLY, MISSOURI, Etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on June 17, 1959.

Opinion Below

The unreported memorandum opinion of the District Court entered on June 27, 1958 (R. 396-406) is printed in Appendix A hereto, *infra*, at page 1a, along with the findings of fact and conclusions of law entered on Oct. 2, 1958. The opinion of the Court of Appeals is reported at 267 F. 2d 733 and is printed in Appendix B hereto, *infra*, at page 21a.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The judgment of the Court of Appeals was entered on June 17, 1959.

Question Presented

Whether respondents' failure to renew petitioners' contracts as teachers in the public schools of Moberly, Missouri and their refusal to reemploy petitioners since the 1954-55 school term were decisions based upon racial considerations and, as such, arbitrary, unreasonable and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

Statement

Petitioners are Negroes and former school teachers in the school district of the City of Moberly, Missouri. Prior to the 1955-56 school term the schools in Moberly were racially segregated. Negro children were required to attend the Lincoln School, a combination elementary and secondary school, and white children attended other elementary and secondary schools. In the 1954-55 school term, the Lincoln School had a teaching staff of eleven, all of whom were Negroes. Petitioners had all taught at the Lincoln School for from one to thirty years when their services were terminated at the close of the 1954-55 school term (R. 144, 145, 259, 303, 320, 329, 335).

Following this Court's decision in 1954 outlawing public school segregation, respondent school authorities appointed a committee to study the problem in respect to the schools in Moberly. After study, deliberation and investigation of community sentiment, a plan of desegregation was adopted which involved abandonment of the Lincoln School and the

absorption of the Negro pupils into the other schools.[1] It was found that this could be done without any substantial increase in the teacher-pupil ratio and, thus, that the desegregation plan decided upon would necessitate a smaller teaching force than had been required when segregation was practiced.[2] The testimony of the Superintendent, and the former President of the Board and the then President of the Board was in agreement that the decision not to renew the contracts of the eleven Negro teachers—the total Negro teaching force in Moberly—was made because it was found that there would be a need for eleven fewer teaching positions with the institution of desegregation in the 1955-56 school term.[3]

With the publication of the proposed plan for desegregation and the abandonment of the Lincoln School, the Negro teachers were concerned about their jobs and made inquiry both of the Superintendent and of members of

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[1] It should be pointed out that the Lincoln School was in excellent condition and has been put back into operation as a public school in the 1956-57 school term. The North Park School has now been abandoned (R. 359-60).

[2] This resulted from the fact that all schools were close to each other, and the absorption of Negro children in the other schools meant, therefore, only an additional 3 or 4 children in each class (R. 353-354).

[3] In the 1954-55 school term, 98 teachers were employed 87 white and 11 Negro (Appellants' Exhibits p. 85, Pl. Ex. 6—Application for Classification 1954-55). In the 1955-56 school term, 91 teachers were employed—all of whom were white (Appellants' Exhibits p. 59, Pl. Ex. 5—Application for Classification 1955-56). Thus, the reduction in the teaching force was 7 not 11. The explanation given for this disparity between the testimony of respondents and what actually took place was that during the 1955-56 school term new positions were created and an unexpected need for additional teachers arose. This is entirely plausible and, at any rate, is uncontroverted. Petitioners point this out, however, to keep the record straight.

the Board concerning their future in the school system (R. 266, 267).

Under Missouri law unless teachers are notified on or before April 15 that their contracts will not be renewed, their employment for the succeeding school term is automatic. On April 11 the Superintendent wrote a letter to the members of the School Board which read in part as follows (R. 83):

> Since Lincoln School is to be closed, it appears that teaching positions in that building will need to be discontinued. The only method by which contracts for teachers now teaching at Lincoln can be renewed is to dismiss employees in comparable positions in other schools.
>
> * * *
>
> On the basis of the above summary of requirements for positions and qualifications of persons currently employed in them, I can see no justification for discharge of any employee to permit retention of an employee now filling a position which is being discontinued. Therefore, it is my recommendation that contracts for teachers now employed in Lincoln School be terminated at the end of this school year.

On April 13 the School Board met to take up the question of the renewal of the contracts of the teaching force. The Board minutes show that the Board took action in the following order: (1) It acted favorably on the request of Mrs. Virginia Pressley, a teacher in the junior college, to retire (Mrs. Pressley held a position which none of the petitioners herein was qualified to fill); (2) on the recommendation of the Superintendent, the contracts of three white teachers (Mrs. Elizabeth Richmond who taught in the elementary grades, Miss Vera Wilhite and Mr. LeRoy Durham, who taught in the junior high school) were not renewed; and finally (3) the contracts of the eleven Negro teachers were not renewed.

Board regulations provide that all persons to be employed must be recommended by the Superintendent and appointed by the Board, and that all recommendations be made on the basis of merit determined by the Superintendent "from the applicant's qualifications, training, experience, personality and ability to fulfill the requirements of the position" (Appellants' Exhibits, p. 15, Rules and Regulations of the Board of Education, Article IV, Section 1(b)).[4] The regulations further require that teachers have special training for the position to which assignment is made, a certificate certifying that state requirements have been met and a certificate of good health (Appellants' Exhibits, p. 16, Rules and Regulations of the Board of Education, Article IV, Section 2(a)).

In the elementary grades a Bachelor's Degree in elementary education is necessary, as well as a distribution of courses in the various areas of the Missouri Elementary School Curriculum. Those teachers in the school system without a degree must meet the state regulations with respect to receiving additional credit until a degree is obtained. For secondary teachers a Bachelor's Degree with a major in the subjects to be taught is required, as well as any additional training which is determined necessary for the position for which assignment is sought (Appellants' Exhibits, p. 16, Rules and Regulations of the Board of Education, Article IV, Section 2(b)).

In the Supplemental Report of the Committee on Integration dated February 25, 1955 (Appellants' Exhibits, p. 24), it was pointed out that the abolition of Lincoln School might cause the release of some teachers. "It is recommended that teachers be hired (as provided by current regulations) on the basis of merit determined by the applicant's qualifications, training, experience and ability to fill the position" [Id. at p. 30].

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[4] The page references referred to in this document are those in red at the bottom of each page.

On May 4, 1953, before the 1954-55 school term ended, three new teachers were hired to teach in the elementary schools and one to teach in the junior high school (R. 47). Two of these teachers had no prior teaching experience (R. 100). On May 10, 1955, again before the end of the 1954-55 school term, a Mrs. Brockman was hired to teach English in the junior high school; a Mr. Thompson to teach elementary music and Miss Dudeck to teach vocational home economics (R. 48); and Miss Dudeck was without prior teaching experience (R. 96).

After the close of the 1954-55 school term, on June 8, 1955, two more new teachers were hired to teach in the elementary schools (R. 49); on August 8, 1955, two teachers were added to the elementary school teaching staff (R. 50), and on June 6, 1956, additional teachers were added to the school system (R. 49-50). There is no dispute that all of these teachers were white.

Contending that the refusal to renew their contracts was based upon discrimination barred by the due process and equal protection clauses of the Fourteenth Amendment, petitioners commenced this suit in the United States District Court. A trial on the merits took place from August 20-23, 1956. Approximately two years later, on June 27, 1958, the District Court filed its opinion (R. 392). On October 2, 1958, it entered findings of fact and conclusions of law and judgment in favor of respondents (R. 406-416). Petitioners took an appeal to the United States Court of Appeals, and on June 17, 1959, that court handed down its opinion and judgment in respondents' favor. Whereupon petitioners bring the cause here.

REASONS FOR ALLOWANCE OF THE WRIT

I

The decision below cannot be reconciled with the decisions of this Court.

1. The opinion below is in conflict with the decisions of this Court in that the Court of Appeals failed to make its own independent evaluation of those evidentiary facts, upon which the trial court based its judgment rejecting petitioners' claim that their constitutional rights had been violated by the refusal of the respondent school board to retain them or any other Negro teacher in the Moberly school system. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659; *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287; *St. Joseph Stock Yards Company* v. *United States*, 298 U. S. 38, 49-55; *Baltimore & Ohio Railroad Company* v. *United States*, 298 U. S. 349, 372; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Feiner* v. *New York*, 340 U. S. 315, 316, 322, fn. 4; *Muir* v. *Louisville Park Theatrical Association*, 102 F. Supp. 525 (W. D. Ky. 1951), aff'd, 202 F. 2d 275 (6th Cir. 1953), vacated and remanded, 344 U. S. 971; *Norris* v. *Alabama*, 294 U. S. 587, 589, 590; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Watts* v. *Indiana*, 338 U. S. 49, 50-51; *Napue* v. *Illinois*, —U. S.—, 3 L. ed. (Adv. pp. 1217, 1222, 1223); *Spano* v. *New York*, —U. S.—, 3 L. ed. (Adv. pp. 1265, 1267). Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, 285.

The Court of Appeals approached decision on the theory that it was bound by the judgment below if there was substantial evidence to support the findings. The court said:

> Plaintiffs' theory is that the Board could not possibly have come up with the result of refusing reemployment to the eleven Negro teachers honestly and in good faith upon the basis that in each instance

> a white teacher had superior qualifications for a position to which the Negro teacher was eligible, and that an inference must be drawn from such result that the Board in its decision was influenced by discriminatory racial considerations.
>
> We concede that the result is unusual and somewhat startling. In the usual situation, considering the number of applicants involved, one would suppose that a fair application of standards would result in the reemployment of some of the Negro teachers. However, we cannot say with certainty here that there was no substantial evidence to support the trial court's finding and conclusion that the Board acted honestly pursuant to its rule in awarding the teacher contracts.

Petitioners contend that this was error and that where "there is, as here, a claim of denial of rights secured under the federal Constitution, neither this Court nor the Court of Appeals is bound by the conclusions of the lower court but must reexamine the evidentiary basis upon which those conclusions are founded to fulfill the function of determining the scope and reach of equal protection and due process under the Fourteenth Amendment. See *Niemotko* v. *Maryland, supra,* and other cases cited *ante*.

Precisely that situation is present in this case. The claims here made are not settled by a mere statement by school authorities that racial discrimination was not involved. In a situation of this character, far more complex and subtle issues are brought into play. Nor can it be expected that respondents will concede that a racial consideration governed the decision regarding these petitioners and the other Negro teachers. The admonition of Judge Fuld of the New York Court of Appeals is particularly pertinent here. In *In the Matter of Holland* v. *Edwards*, 307 N. Y. 38, 45 (1954), he stated:

> One intent on violating the Law against Discrimination cannot be expected to declare or announce his

> purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct . . . play no small part' . . .

The action of the Board in failing to renew the contract of a single Negro teacher, without more, raises a suspicion that racial discrimination was practiced, and led the Court of Appeals to state in its opinion the "result is unusual and somewhat startling. In the usual situation, considering the number of applicants involved, one would suppose that a fair application of standards would result in the reemployment of some of the Negro teachers". Indeed, this case presents that situation of suspected racial discrimination which must be subject to the most careful scrutiny. See *Bolling* v. *Sharpe*, 347 U. S. 497, 499; *Korematsu* v. *United States*, 323 U. S. 214, 216; *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Therefore, the controlling constitutional doctrine that the evidentiary facts must be independently examined on appeal becomes doubly crucial in the adjudication of petitioners' claims.

2. The basic issue in this case is whether respondents refused to renew the contracts of these petitioners and other Negro teachers solely because of their race and color and in derogation of rights to due process and equal protection of the laws. Since there is and can be no dispute that the Fourteenth Amendment bars racial discrimination in respect to employment of teachers in public schools, the evidence adduced at the trial below was decisive to any determination of this claimed deprivation of constitutional rights.

There is little dispute about the "facts". Petitioners' contracts were not renewed on a theory advanced at the hearing that with the desegregation of the public schools in the 1955-56 school term, eleven fewer teachers would be needed. Yet, at the April 13, 1955, meeting of the Board,

before the decision was made not to renew the contracts of any of the Negro teachers, the Board had voted not to renew the contracts of three white teachers.[5] The teachers involved were Mrs. Elizabeth Richmond, who taught the 5th grade; Miss Vera Wilhite, who taught social science in the 8th grade; and Mr. LeRoy Durham, who taught 8th grade mathematics and general science. (Appellants' Exhibits pp. 73, 67, 63).

Thus, positions were available in junior high and elementary schools which petitioners were qualified to fill. There were four Negro elementary school teachers (R. 135). Petitioner Tymony was certified to teach English, speech, American history, mathematics and social science, grades 7-9, and held a life certificate qualifying her to teach the elementary grades and a permanent secondary school certificate (R. 261). Petitioner Washington was certified to teach general mathematics and biology and had been teaching those subjects at the Lincoln School (R. 145). Moreover, before the 1954-55 school term ended, new teachers were added at the elementary, junior high and senior high school levels in positions which petitioners were qualified to teach, and among those hired were persons without prior teaching experience.

Mr. Henderson, the Superintendent, at first took the position that all the criteria set out in the Board's regulation—qualifications, training, experience, personality and ability to fulfill the position—had been applied in reaching the decision not to renew the contracts of the Negro teachers (R. 91); that although he had found that there

[5] Here is a typical example of the lack of candor on the part of respondents. Mr. Henderson stated that he did not know that there would be three vacancies until the close of the meeting on April 13 (R. 87), but he himself recommended that the contracts of these three teachers not be renewed in his letter of April 11 (R. 165, Pl. 3F), and, therefore, when the teachers were fired, they were fired on his recommendation.

were some Negro teachers with more training and experience than some of the white teachers (R. 92), he could not conclude on the basis of personality that all the white teachers were superior to the Negro teachers (R. 93). Based upon a composite of all the qualifications set forth in the regulations, Mr. Henderson testified that he reached the decision that the Negro teachers were inferior to the white teachers retained or new to the school system.

Petitioners introduced evidence at the trial which disclosed that in terms of qualifications, training and experience the Negro teachers were not at the bottom of the scale, when compared either with the white teachers already in the school system during the 1954-55 school term or those subsequently added to the teaching staff (Moore, R. 95-103; Pitts, R. 105-112; Harris, R. 120-124; Hughes, R. 129-131; Graves, R. 132-135; Tymony, R. 142-144; Brooks, R. 144-145; Washington, R. 145-146).

The record discloses that as the evidence for petitioners developed that there was no great disparity between petitioners and white teachers in respect to concrete qualifications of training and experience, the Superintendent placed increasing reliance upon the superiority of the white teachers in terms of "personality" and "intangibles" to disprove the charge of racial discrimination. The "subjective judgment" became the paramount consideration (R. 166, 167, 168, 214), and "intangibles" and "personality" were embraced as the *most* important (R. 168) and decisive factors (R. 214) in determining teacher fitness.

The teacher evaluation method employed in Moberly was that of rating by official superiors. There is no agreement by authorities in the field as to the validity of any evaluation method. Assn. for Supervision and Curriculum Development, Nat'l Ed. Assn., *Better Than Rating: New Approaches to Appraisal of Teaching Services* 34-54 (1950); Barr, "Measurement of Teaching Efficiency. Growing Points In Education Research." *Official Report of the Am.*

Ed. Assn., Nat'l Ed. Assn. 251-254 (1949); Chamberlain and Kindred, *Teacher and School Organization* 308-317 (1949); Evans, "A Critical Survey of Methods of Assessing Teaching Ability," 21 British J. of Ed. Psych. 89-95 (1951); Domas and Tiedman, "Teacher Competence: An Annotated Bibliography," 19 *J. of Experimental Ed.* 101-213 (1950); Leeper, "Fred Brown vs. The Elusive Ideal Teacher," 39 *Nat'l Ed. Assn. J.* 672, 674 (1950); "'Merit' Rating—What's Wrong With It? New York AFT Members Give the Answer," 33 *American Teacher* 7-8 (1949); Watters, "Annotated Bibliography of Publications Related to Teacher Evaluation," 22 *J. of Experimental Ed.* 351-368 (1954); Tompkins and Armstrong, "Teacher Ratings: Persistent Dilemma," 35 *Nat'l Assn. of Secondary Schl Principals Bulletin* 25-31 (1951).

The consensus of the authorities, however, is that teacher ratings must be continuous and comprehensive and that more than one evaluation method or type of data gathering must be made. See Assn. for Supervision and Curriculum Development, Nat'l Ed. Assn., op. cit. *supra;* Barr, "Measurement of Teaching Efficiency," op. cit. *supra;* Beecher, *The Evaluation of Teaching: Background and Concepts* 84 (1949); Evans, op. cit. *supra;* Teacher Rating, Nat'l Ed. Assn. Dept. of Classroom Teachers and Research Division, *Discussion Pamphlet No. 10;* Scates, "The Good Teacher: Establishing Criteria for Identification," *J. of Teacher Ed.* 137-141 (1950).

Authorities question the validity of the method employed by the respondent school authorities, see *Better Than Rating*, op. cit. *supra;* McCall, *Measurement of Teacher Merit*, Publication No. 284, Raleigh, North Carolina Department of Public Instruction (1952); "'Merit' Rating—What's Wrong With It?", op. cit. *supra;* Vander Werft, "The Trouble With Rating Systems," 125 *Am. Sch. Bd. J.* 17-18 (1952); and one authority suggests that this method has no validity at all. See McCall, *Measurement*

of Teacher Merit, op. cit. *supra*. It is agreed, however, that if this method is used, to have any validity the appraiser must observe the teacher frequently and for adequate periods; must record the evidence carefully and have subsequent conferences with the teacher in order to draw fair inferences from the recorded evidence and arrive at a joint judgment with the teacher as to what the basic problems are.

In this instance the observations were neither continuous nor for long periods. Indeed, those relied upon were of an exceedingly limited nature (R. 76-77). The appraisals of the petitioners' immediate superior—their principal—were totally discounted (R. 172), and the high evaluation of the elementary Supervisor was down graded on the witness stand (R. 120). There was no recordation of evidence (R. 222, 231-27)[6] and no subsequent consultation with the teachers (R. 81)—all in violation of the basic tenets of teacher evaluation. One leading study states:

> Since teacher rating requires the measurement of intangibles upon which the opinions and judgments of rating officials differ, all ratings must be mainly subjective. Subjective judgments open the way to the exercise of personal preference of biases. Rating scales are valid only as measures of the rater's opinion of the teacher; they indicate the teacher's personal 'prestige' score in the estimation of the rating officer . . . Subjective rating is not a defensible or workable plan even among a small group of teachers. American Federation of Teachers, Merit Ratings 16, 53 (1958).

At no time had petitioners been advised that they were not giving satisfaction (R. 68, 80), and where there was concrete evidence, the evaluations of the Superintendent

[6] Here again the Superintendent's testimony was contradictory. At first he indicated that a record of his observations was kept, but subsequently he admitted that there were no such records (R. 181, 216, 217-222).

were clearly disputed. For example, Mr. Henderson described Mrs. Pitts as an average teacher (R. 101). Her principal regarded her as one of his best teachers and the elementary Supervisor described her as a strong teacher, hard working, fair and honest in dealing with, and outstanding in keeping in touch with parents and students (R. 120). Mrs. Pitts (as did other Negro elementary teachers) taught two grades, while white teachers taught only one.

Similarly, Mr. Henderson testified he did not have a high regard for the teaching competence of petitioner Moore, who taught home economics. The two state Supervisors of the home economics program, however, who visited the school and spent time in observing Miss Moore's conduct of the classes, praised her interest, diligence and initiative (R. 306-310), and subsequently she successfully qualified for employment in the East St. Louis, Illinois, integrated school system by passing a competitive teachers' examination (R. 311-312).

The elementary Supervisor gave a high recommendation to Miss Hughes (who had taught the first grade in Moberly for 30 years) for a teaching position in Robertson, Missouri, which is an integrated school system, and she has been teaching there ever since (234). Mrs. Tymony, whose formidable qualifications and training made her unquestionably the equal, if not the superior, of any white teacher in the school system, was considered a personality problem. Yet she had taught at Moberly for some 13 years (R. 259), and only when faced with the possibility of her teaching in a non-segregated school system were her "personality" defects found to be a basis for disqualification.

The record conclusively established, petitioners submit, that respondents' judgment as to the superior "intangibles" possessed by the white teachers, which allegedly led to the decision not to renew the contracts of the eleven

Negro teachers, was not based upon any ascertainable guide or criterion. Thus, the precision and basic controls which valid teacher evaluations require were replaced by a vague personal judgment. When, as in the case at bar, available concrete evidence concerning training, experience, and appraisals by superiors clearly militates against the respondents' elusively grounded evaluations, there is compelling reason for holding that the School Board has acted arbitrarily and capriciously by relying on racial considerations. Petitioners do not discount "intangibles" in determining teacher fitness but contend that here what respondents call 'intangibles" was merely an effort to camouflage a deliberate decision to discriminate against Negro teachers because of race.

Petitioners contend that any fair appraisal of the evidence supports their assertion that discrimination was practiced and that the trial court's contrary findings are fundamentally in error. Furthermore, it is submitted that the Court of Appeals erred in failing to evaluate the evidence for itself, as this Court must do, in order to determine whether claimed infractions of constitutional guarantees occurred.

3. The contention that a new appraisal of the Negro teachers became necessary, because of the duty to obtain the best qualified teachers, will not bear scrutiny. It is incredulous that all teachers, regardless of length of service, were freshly evaluated on April 13, 1955, and that the Negro teachers alone were inferior. Obviously it was not the practice of respondent school authorities to evaluate each teacher's qualifications and ability against all other candidates applying for positions. Indeed it is conceded that prior satisfactory service was an important qualification for retention and that in such an eventuality new applicants would not be considered (R. 76). As to Negro teachers, however, they were treated differently—no weight

was given to prior satisfactory service and despite a total absence of any showing of supervisory criticism of their work, Negro teachers were evaluated *de novo* and placed in a position of competing for jobs with other applicants for positions in the school system.

In this case the Negro teachers were subjected to treatment different than that accorded other teachers once the decision to desegregate the schools had been adopted. Indeed, had this not been done the question of evaluations could not have arisen. At least three, if not more, of the Negro teachers would have been retained when on April 13 and on May 4 and May 10, before the school term ended, it was discovered that openings were available which petitioners were qualified to fill. No occasion could have arisen to require a comparison of petitioners with persons not in the Moberly school system. Had petitioners been white, the three best qualified for positions opened by the Board's action on April 13 would have been retained. Thereafter, as openings occurred on May 4 and on May 10, others would have been offered positions before any effort was made to seek outside personnel. What happened instead was that Negro teachers and only Negro teachers were adversely affected by the school reorganization.

It is submitted, therefore, that if record is reevaluated, as it must be, that the judgment of the lower court can not be sustained.

II

This is an issue of great public importance.

Many educational systems in the United States at the present time are in the throes of change required by this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483. As the Fourteenth Amendment outlaws discrimination against pupils, it also condemns discrimination

against teachers. See *Alston* v. *School Board*, 112 F. 2d 992 (4th Cir. 1940), cert. denied, 311 U. S. 693; *Shelton* v. *McKinley*, —F. Supp.— (E. D. Ark. 1959); *Bryan* v. *Austin* 148 F. Supp. 563 (E. D. S. C. 1957), vacated and remanded, 354 U. S. 933. The fact that a school system eliminates pupil discrimination is no basis for viewing racial discrimination against teachers leniently. Indeed, there is serious question whether the removal of discrimination against pupils required in *Brown* v. *Board of Education*, *supra*, can be fully realized in a school system which does not, at the same time, bar racial discrimination in the employment, placement and upgrading of its teachers.

Approximately 91,806 Negroes are employed as public school teachers in the seventeen states and the District of Columbia where school segregation was required (Status of School Segregation-Desegregation in the Southern and Border States, page 2, *Southern Education Reporting Service* (1958)). Obviously this large number of teachers were initially employed, as here, to teach in segregated schools. With the transformation from a segregated to a nonsegregated school system, serious question arises as to the immediate fate of this large body of Negroes in the teaching profession, unless school authorities are held to the requirements of the Fourteenth Amendment which prohibits Negro teachers being discriminated against or subjected to different treatment because of their race.

The question posed by this petition is perhaps even more vital than was the establishment of the constitutional principle that discrimination in respect to teachers' salaries was at war with guarantees of the Fourteenth Amendment. See *Alston* v. *School Board*, *supra*. Adjudication of the issues raised in this petition will have a crucial effect on the job security, hopes and aspirations of the entire Negro teaching profession, for if it is made clear that the Fourteenth Amendment will countenance neither sophisticated nor ingenuous acts of discrimination against Negro teachers

as a class, school authorities will be required to apply that high standard of equal treatment which the Constitution commands and which the nation's conscience necessitates—a goal which is the basic objective of a democratic society.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

Plaintiffs, who were Negro school teachers employed by the School District of the City of Moberly, Missouri, for the school year 1954-55, were not re-employed for the school year 1955-56. The plaintiffs allege that they were not rehired because of a practice, policy, rule or regulation adopted by the defendants, whereby only persons of the white race would be hired as teachers, and that under said practice, policy, rule or regulation the District refuses to hire or rehire persons of the Negro race as teachers in said District.

The plaintiffs seek a judgment or decree declaring that such practice, policy, custom and usage of the defendants is in violation of the Constitution and laws of the United States; that an injunction be issued forever restraining and enjoining the defendants from denying to qualified Negro teachers employment in the school because of their race or color and from making any distinction whatsoever because of their race and color, and for damages.

Jurisdiction of this court is properly invoked since the Fourteenth Amendment to the Constitution is involved.

There is no dispute between the parties as to the applicability of the Fourteenth Amendment to the Constitution. The plaintiffs in Paragraph 10 of their petition plead as follows:

> "The plaintiffs further state that under color of their authority, defendants and each of them in operating, managing and controlling the Public Schools under their control, have adopted a strict policy of not hiring duly qualified applicants of the Negro race to teach in said public schools. This

practice, policy, custom and usage of refusing to employ qualified public school teachers of the Negro race in said district school teachers, is arbitrary, illegal, unlawful and violative of the rights of the plaintiffs and has deprived them of employment in their chosen occupations."

Defendants in their joint answer with respect to Paragraph 10 of plaintiffs' complaint, answered as follows:

> "Defendants deny each and every allegation contained in Paragraph 10 of plaintiffs' complaint, except that defendants admit that if the facts therein stated were true, and a practice, policy, custom or usage, as charged in said paragraph, existed, or had existed, which defendants deny, that same would have been arbitrary, illegal, unlawful and violative of the rights of plaintiffs."

In view of the pleadings, it is not necessary for the court to deal with the rights of the parties under the Fourteenth Amendment. The problem for the court is to determine whether the action of the School District in not rehiring the plaintiffs, or any of them, for the school year 1955-56, was arbitrary, illegal, unlawful and violative of the rights of the plaintiffs, or any of them.

There is little dispute between the parties as to the events which led to this litigation. The Moberly School System had been conducted as a segregated system until the decision of the Supreme Court declaring segregation invalid. Promptly after the Supreme Court decision, the School Board, in June, 1954, appointed a committee to study and report back to the Board the best method of integrating the schools. The Board operated elementary schools, high schools and a junior college, and enjoyed a triple A rating at the time. The committee appointed by

the Board spent much time in giving careful consideration to the problem of integration and during its work on the problem held mass meetings with both the white and Negro citizens. The committee reported to the Board in December of 1954, its report being a fifteen-page document, with two additional pages attached as exhibits to its recommendation. The committee suggested four plans, which in brief, were as follows:

(1) Close Lincoln School (the Negro elementary and high schools) and send the pupils to the school district in which they lived. District boundaries would remain as at present.

(2) Retain Lincoln School as an elementary unit for all pupils in a new district created from portions of Central, South Park and West Park. All elementary pupils would attend school in the district in which they lived.

(3) Close Lincoln School and redistrict all Moberly, changing boundary lines where necessary to more nearly equalize enrollments.

(4) Retain Lincoln School for Negro pupils who might choose to attend there.

When the committee submitted the suggested four plans, it recommended Plan No. 2, which would retain Lincoln School as an elementary unit for all pupils in a new district created from portion of the entire district, and the two pages attached to the report set out in detail, and included a map of the proposed redistricting of the school into elementary districts. The Board upon receipt of the proposal and after due consideration of it, directed the committee to submit to the citizens its report and to seek their reaction to the various proposals and to advise them of its recommendation that Plan No. 2 be adopted.

Appendix A

There was employed during the 1954-55 school year by the district 109 teachers, 98 of whom were employed in the white schools and 11 in the Negro school (Lincoln). The plan recommended by the committee would have required at least 109 teachers, and possibly one or two more. When the report of the committee and its recommendation were submitted to the citizens, its recommended plan was vigorously opposed by both white and Negro citizens, and as a result the integration committee filed a supplemental report, which, among other things, recommended to the Board that Lincoln School be closed and that the boundaries of existing districts be changed to equalize the enrollment of both Negro and white pupils in the various elementary schools. The committee found that by making this change all of the pupils, both Negro and white, could be absorbed into the remaining elementary schools without overcrowding and without increasing the pupil-teacher ratio beyond acceptable limits.

The committee in holding the mass meetings had been queried by some of the Negro teachers as to the effect on employment and they had been advised that the committee was not dealing with the question of teachers, but only with the integration of Negro and white pupils and that the matter of employment of teachers was one for the Board, and the committee had not been vested with any power with respect to such nor asked to make any recommendation or report regarding same.

The supplemental integration report did, however, note that fewer teachers would be needed in the system if the plan which it recommended therein was adopted. The plan was adopted and met with approval by both the Negro and white citizens, and the parties to this suit stipulated that the Board fairly and honestly and expeditiously went about and conducted the integration of the colored and white pupils in the Moberly school system prior to the

filing of the suit. It was further stipulated in the case that no member of the School Board nor any person connected with the district attempted to influence the colored citizens of the district to accept a voluntary one-race colored school to be conducted in the former colored school building known as the Lincoln School Building.

The Board had in force at the time of the integration a rule with respect to the basis upon which the Superintendent of Schools should recommend the employment of teachers to the Board, under which the Board should employ teachers, which rule is as follows:

> "All applications for employment in Moberly Public Schools must be in writing and submitted to the Superintendent's office. All persons to be employed shall be recommended by the Superintendent and appointed by the Board of Education. Recommendations for appointment shall be made on the basis of merit, determined by Superintendent, from the applicant's qualifications, training, experience, personality and ability to fulfill the requirements of the position. All employees must be physically fit too serve efficiently. Teachers are to file a health certificate with the Superintendent before assuming their duties."

It was stipulated by the parties that this was a proper rule for the employment of teachers and was fair and just.

The supplemental integration report suggested that this rule be used in determining which teachers should be retained. It was stipulated by the parties in this case that it was the duty of the Board to employ in said districts the teachers who in its judgment best complied with the rules relating to the employment of teachers, and it was the further duty of the Superintendent to make his recommendation to the Board on the basis of the rules.

Appendix A

Under the law of Missouri, teachers who are not to be retained in a school system must be so notified of said fact by April 15th preceding the teaching year. Prior to April 15th the Superintendent of Schools in accordance with the rule set out above wrote each board member, two of whom were new, having been elected in the early part of that month comparing as to training and experience the various teachers employed by the District, and on April 13th the Board met with the Superintendent and at that meeting the teachers in the system both Negro and white were discussed with a view of determining which teacher should not be re-employed. The school where the Negroes had been teaching and the positions they held had been abolished by the integration plan adopted, and 11 less teachers were needed under the plan than had been employed that year.

The testimony indicates that at this meeting the training, experience, personality and ability to fulfill the requirements of the position, including various intangibles, were discussed, and the testimony indicates that the Board's decision was based on its rule with respect to the employment of teachers. There is no testimony that there was any effort to get rid of the Negro teachers, either as individuals or as a group, because of race or color. The Board determined after a full and fair consideration of the matter that the white teachers in the system were better qualified than the Negro teachers and none of the Negro teachers were re-employed.

At the Board meeting the contracts of three white teachers were not renewed, but it was the established custom of the Board that when a teacher's contract was not renewed the position was treated as a vacancy, and that when a vacancy occurred, it was the practice of the Superintendent to obtain as many applications as possible for the vacancy and to recommend the filling of the vacancy

with the best qualified applicant. This procedure was followed as to the three vacancies. The Negroes certified to teach in these three positions were considered as applicants for the position, some seven of them being so qualified, but three white teachers were hired to fill the vacancies, each of the three being considered better qualified to fulfill the requirements of the position than any of the Negro applicants.

The plaintiffs put much stress upon the fact that they have been satisfactory teachers under a segregated system, that they were qualified to and did teach in a triple A system, and that the only reason they were not hired was because of their race and color. The testimony indicated that the supply of Negro teachers was limited, that the plaintiffs did compare very favorably with other available Negro teachers, but the ratings they had been given in the past years were based upon comparison with other Negro teachers and not the teachers of the entire district, and when the system became an integrated one they were compared not with Negro teachers alone, but with all the teachers available, and in the opinion of the Superintendent of Schools, who was best qualified to judge, there were other teachers available who were better qualified.

While it is true that in some respects some of the teaching positions were equivalent, or virtually so, although the Lincoln teachers often taught more than one grade, which was not true in the integrated system, it does not necessarily follow that because the positions were equivalent that the particular persons filling them were necessarily equal in all respects in professional attainment and efficiency. The individual qualifications, capabilities and abilities of each teacher must be considered, and human capabilities cannot be reduced to a mathematical formula. Intangible factors, such as personality, character, disposition, industry, adaptability, vitally affect the work of any teacher. The Superintendent's recommendation as

to the various teachers was based upon information he obtained, his own observations, and observations of the principal and other teachers in responsible positions in the district. There was not the slightest inference in the testimony of these men that the race or color of any teacher entered into his recommendations. The court cannot substitute its judgment for that of the School Board or the Superintendent on the wisdom or expediency of a determination within the Board's jurisdiction, but must rather determine if there exists sufficient factual basis that the Superintendent and Board's actions were arbitrary and discriminatory with respect to the Negro teachers.

It has long been recognized by the courts, as was said by Judge Thomas in *Morris v. Williams*, 149 F. 2d 703, l.c. 708:

> "Teaching is an art; and while skill in its practice can not be acquired without knowledge and experience, excellence does not depend upon these two factors alone. The processes of education involve leadership, and the success of the teacher depends not alone upon college degrees and length of service but also upon aptitude and the ability to excite interest and to arouse enthusiasm."

The Superintendent in his testimony dealt specifically with each of the plaintiffs, comparing them with the teachers who were hired, and gave in detail his analysis on each. For the court to reiterate this testimony here would serve little purpose. He stated that only one of the 11 Negro teachers compared favorably with the teachers employed, but that teacher is not one of the plaintiffs in this case. She was a very outstanding teacher and had she been available he stated he would have recommended to the Board that she be hired, but she had emphatically stated to him the year before that the 1954-55 season was definitely

the last year she was going to teach, and in fact he had had trouble prevailing upon her to teach that year.

Nothing would be accomplished by the court in discussing the deficiencies related as to the various plaintiffs in comparison with other teachers who were employed by the District, a system which enjoyed the highest rating possible, that of triple *A*. Most of the plaintiffs have since been employed in the teaching profession in other systems. One of the plaintiffs, the one with the most college education, is employed in a college. She had more college hours than many of the teachers employed by the Board, but the Superintendent placed his failure to recommend her because of a personality problem. His testimony indicated she gave the impression that she considered herself superior to other teachers, created unpleasant relationships with other teachers, created disciplinary problems with some of the classes, was resentful toward authority and made it very unpleasant for her principal. Certainly if we forget the intangibles in her instance she would rate above most who were employed, but when we consider that all-important matter of intangibles which must enter into the teaching profession, she does not compare favorably. In the court's opinion, the Superintendent was rather generous in his appraisal of the intangible factors with respect to this particular teacher, for the attitude displayed by this teacher on the witness stand could not but help leave with the court the impression that all he said was true and that she definitely did not meet the intangible requirements. In her testimony she stated that one of the school board members, Richard Chamier, had made certain statements with respect to the Negro teachers at one of the meetings held by the committee on integration. The statements are such that lead to confusion and sometimes disorder in the problem of integration. The newspaper and radio representatives

who were present at the meeting and who took notes as to what happened, testified that no such statements were made. They were there for the purpose of obtaining newsworthy information, and such statements, if made, would have been used by both in news stories, they stated.

It is unfortunate as to this teacher that she did not recognize, as was recognized and stipulated in the trial of this case, that the District in approaching and solving the integration of the schools was completely fair and moved expeditiously. It is unfortunate when teachers have an attitude such as this teacher has—and I do not mean to say that such attitude is limited to any race or color—but when it does exist it vitally affects the teaching ability of the individual.

One's hindsight is often better than one's foresight, and while it does not enter into the decision in this matter, it is worthy of note that after the pupils in the system were integrated it was found that virtually without exception for the first half of the year 1955-56, the Negro pupils had trouble keeping up in their classes, but that during the second half of the year they were able to do so. It was the opinion of the Superintendent that this was due to the fact that they were not as well grounded in fundamentals as the white pupils with whom they were in classes. This fact supports the analysis of the plaintiffs by the Superintendent. At the time of the trial the Superintendent was no longer employed by the district, having moved to the metropolitan area of St. Louis, where he had a teaching position.

Under the testimony, the facts and circumstances shown in the evidence, the court finds that the plaintiffs have failed to sustain the burden placed upon them, and this applies equally to each plaintiff, that the defendants had a practice, policy, rule or regulation of not hiring duly qualified applicants of the Negro race to teach in the public

schools, but the testimony on the other hand shows that the Negro teachers were given the same consideration as the white applicants in the hiring of teachers. There is no evidence or circumstance which indicates there was any discrimination by the defendants based solely on account of race or color.

Judgment will accordingly be for the defendants. Attorneys for the defendants will prepare the findings of fact, conclusions of law and judgment to be entered and submit same to the court for entry, first obtaining approval from plaintiffs' attorney as to form.

ROY HARPER,
U. S. District Judge.

(June 27, 1958.)

Findings of Fact and Conclusions of Law

The above-entitled cause came on regularly for trial, and the court, having duly examined the evidence, and being fully advised in the premises, now finds as follows:

FINDINGS OF FACT

I.

Plaintiffs, who were negro school teachers employed by the School District of the City of Moberly, Missouri, for the school year 1954-55, were not re-employed for the school year 1955-56. The plaintiffs allege that they were not re-hired because of a practice, policy, rule or regulation adopted by the defendants, whereby only persons of the white race would be hired as teachers, and that under said practice, policy, rule or regulation the District refuses to hire or rehire persons of the negro race as teachers in said Dstrict.

The plaintiffs seek a judgment or decree declaring that such practice, policy, custom and usage of the defendants is in violation of the Constitution and laws of the United States; that an injunction be issued forever restraining and enjoining the defendants from denying to qualified negro teachers employment in the school because of their race or color and from making any distinction whatsoever because of their race or color, and for damages.

II.

It was alleged by plaintiffs that defendants, in operating, managing and controlling the public schools under their control, adopted a strict policy of not hiring applicants of the negro race to teach in said public schools, solely because of their race and color, and that such policy, custom and usage is arbitrary, illegal, unlawful and violative of the rights of plaintiffs, and has deprived them of employment in their chosen profession. Defendants, in their joint answer, denied that such policy, custom or usage existed, but admitted that if it had existed, it would have been arbitrary, illegal, unlawful and violative of rights of plaintiffs.

III.

Jurisdiction of this court is properly invoked, since the Fourteenth Amendment to the Constitution is involved.

IV.

The Moberly School System had been conducted as a segregated system until the decision of the Supreme Court declaring segregation invalid. Promptly after the Supreme Court decision, the School Board, in June, 1954, appointed a committee to study and report back to the Board the best

method of integrating the schools. The Board operated six elementary schools, one high school and a junior college for white pupils, and an elementary school and high school for colored pupils, and enjoyed a triple A rating at the time. The committee appointed by the Board spent much time in giving careful consideration to the problem of integration, and, during its work on the problem, held mass meetings with both the white and negro citizens. The committee reported to the Board in December of 1954, its report being a fifteen-page document, with two additional pages attached as exhibits to its recommendation. The committee suggested four plans, which, in brief, were as follows:

(1) Close Lincoln School (the negro elementary and high schools) and send the pupils to the school district in which they lived. District boundaries would remain as at present.

(2) Retain Lincoln School as an elementary unit for all pupils in a new district created from portions of Central, South Park and West Park. All elementary pupils would attend school in the district in which they lived.

(3) Close Lincoln School and redistrict all Moberly, changing boundary lines where necessary to more nearly equalize enrollments.

(4) Retain Lincoln School for negro pupils who might choose to attend there.

When the committee submitted the suggested four plans, it recommended Plan No. 2, which would retain Lincoln School as an elementary unit for all pupils in a new district created from portions of the entire district, and the two pages attached to the report set out in detail and included a map of the proposed redistricting of the school

into elementary districts. The Board, upon receipt of the proposal and after due consideration of it, directed the committee to submit to the citizens its report and to seek their reaction to the various proposals and to advise them of its recommendation that Plan No. [redacted] be adopted.

There was employed during the 1954-55 school year by the district 109 teachers, 98 of whom were employed in the white schools and 11 in the negro school (Lincoln). The plan recommended by the committee would have required at least 109 teachers and possibly one or two more. When the report of the committee and its recommendation were submitted to the citizens, its recommended plan was vigorously opposed by both white and negro citizens, and as a result the integration committee filed a supplemental report, which, among other things, recommended to the Board that Lincoln School be closed, and that the boundaries of existing districts be changed to equalize the enrollment of both negro and white pupils in the various elementary schools. The committee found that by making this change all of the pupils, both negro and white, could be absorbed into the remaining elementary schools without overcrowding and without increasing the pupil-teacher ratio beyond acceptable limits.

The committee, in holding the mass meetings, had been queried by some of the negro teachers as to the effect on employment, and they had been advised that the committee was not dealing with the question of teachers, but only with the integration of negro and white pupils, and that the matter of employment of teachers was one for the Board, and the committee had not been vested with any power with respect to such, nor asked to make any recommendation or report regarding same.

The supplemental integration report did, however, note that fewer teachers would be needed in the system if the plan which it recommended therein was adopted. The

plan was adopted and met with approval by both the negro and white citizens, and the parties to this suit stipulated that the Board fairly and honestly and expeditiously went about and conducted the integration of the colored and white pupils in the Moberly school system prior to the filing of the suit. It was further stipulated in the case that no member of the School Board nor any person connected with the district attempted to influence the colored citizens of the district to accept a voluntary one-race colored school, to be conducted in the former colored school building known as the Lincoln School Building.

V.

The Board had in force at the time of the integration, and for a number of years before, a rule with respect to the basis upon which the Superintendent of Schools should recommend the employment of teachers to the Board, under which the Board should employ teachers, which rule is as follows:

> "All applications for employment in Moberly Public Schools must be in writing and submitted to the Superintendent's office. All persons to be employed shall be recommended by the Superintendent and appointed by the Board of Education. Recommendations for appointment shall be made on the basis of merit, determined by Superintendent, from the applicant's qualifications, training, experience, personality and ability to fulfill the requirements of the position. All employees must be physically fit to serve efficiently. Teachers are to file a health certificate with the Superintendent before assuming their duties."

It was stipulated by the parties that this was a proper rule for the employment of teachers, and was fair and just.

The supplemental integration report suggested that this rule be used in determining which teachers should be retained. It was stipulated by the parties in this case that it was the duty of the Board to employ in said districts the teachers who, in its judgment, best complied with the rules relating to the employment of teachers, and it was the further duty of the Superintendent to make his recommendation to the Board on the basis of the rules.

VI.

Under the law of Missouri, teachers who are not to be retained in a school system must be so notified of said fact by April 15th preceding the teaching year. Prior to April 13th, the Superintendent of Schools, in accordance with the rule set out above, wrote each board member, two of whom were new, having been elected in the early part of that month, comparing as to training and experience the various teachers employed by the district, and on April 13th the Board met with the Superintendent, and at that meeting the teachers in the system, both negro and white, were discussed with a view of determining which teacher should not be re-employed. The school where the negroes had been teaching and the positions they held had been abolished by the integration plan adopted, and 11 less teachers were needed under the plan than had been employed that year.

VII.

At this meeting, the training, experience, personality and ability to fulfill the requirements of the position, including various intangibles, were discussed, and the Board's decision was based on its rule with respect to the employment of teachers. There is no testimony that there was any effort to get rid of the negro teachers, either as

individuals or as a group, because of race or color. The Board determined, after a full and fair consideration of the matter, that the white teachers in the system who were re-employed were, in each instance, better qualified than the nego teachers, and none of the negro teachers were re-employed.

VIII.

At the Board meeting, the contracts of three white teachers were not renewed, but it was the established custom of the Board that when a teacher's contract was not renewed that the position be treated as a vacancy, and that when a vacancy occurred it was the practice of the Superintendent to obtain as many applications as possible for the vacancy and to recommend the filling of the vacancy with the best qualified applicant. This procedure was followed as to the three vacancies. The negroes certified to teach in these three positions were considered as applicants for the position, some seven of them being so qualified, but three white teachers were hired to fill the vacancies, each of the three being considered better qualified, under the Board's rule, to fulfill the requirements of the position than any of the negro applicants.

IX.

The supply of negro teachers was limited; the plaintiffs did compare very favorably with other negro teachers, but the ratings they had been given in the past years were based upon comparison with other negro teachers and not the teachers of the entire district, and when the system became an integrated one they were compared not with negro teachers alone, but with all the teachers available, and in the opinion of the Superintendent of Schools, who was best qualified to judge, there were other teachers available who were better qualified.

Appendix A

X.

In some respects, some of the teaching positions to be filled after integration were equivalent, or virtually so, to positions plaintiffs had filled in the Lincoln Schools, although Lincoln teachers often taught more than one grade, which was not true in the integrated system. The Superintendent's recommendations to the Board, in each instance, as to all teachers, were based upon information he obtained, his own observations and observations of the principal and other teachers in responsible positions in the district. Such recommendations included intangible factors, such as personality, character, disposition, industry, adaptability and the ability to acquire and impart knowledge and follow instructions. The Board's decisions were based partly on their own observations and knowledge, but largely on the recommendation of the Superintendent.

XI.

Neither the Superintendent in his recommendations nor the Board in its decisions were influenced by the race or color of plaintiffs.

XII.

There was only one negro teacher of the eleven formerly employed who compared favorably with the teachers employed. She was not an applicant or plaintiff, having retired from the teaching profession at the end of the 1954-5 school year.

XIII.

After integration in the first half of the 1955-6 school year, the negro pupils had trouble keeping up with their classes, but were able to do so in the second half of the

year. This was due to the fact that instruction under the teachers employed was better than the instruction which the negro pupils had received under plaintiffs and other colored teachers prior to integration.

Conclusion of Law

From the foregoing facts, the court concludes:

I.

That the court had jurisdiction of parties and subject matter.

II.

That the court cannot substitute its judgment for that of the School Board or Superintendent, on the wisdom or expediency of a determination within the Board's jurisdiction, unless there exists sufficient factual basis to show that the Superintendent's and Board's actions were arbitrary and discriminatory with respect to negro teachers.

III.

That the Superintendent and Board were justified in considering and giving weight to such intangible factors as personality, character, disposition, industry, adaptability, ability to follow instructions and to receive and impart knowledge, as well as the other elements of the Board's rule, in deciding on the qualifications of teacher applicants.

Appendix A

IV.

That the Board did not have a practice, policy, rule, regulation or custom to not hire duly qualified applicants of the negro race to teach in the public schools of the School District of Moberly, Missouri.

V.

That the negro teachers in the school system of the School District of the City of Moberly, Missouri, were given the same consideration as white applicants in the hiring of teachers of the integration.

VI.

That there was no discrimination by defendants against plaintiffs, based on race or color, in the hiring of teachers to teach in the School District of Moberly, Missouri.

VII.

That plaintiffs take nothing by their complaint, and that defendants have judgment for their costs and disbursements herein expended.

Let judgment be entered accordingly.

Dated this 2nd day of October, 1958.

ROY W. HARPER,
U. S. District Judge.

APPENDIX B

Opinion of the Court of Appeals

June 17, 1959

Before SANBORN, VAN OOSTERHOUT, and MATTHES, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Plaintiffs, seven Negro school teachers, who were employed by the defendant School District to teach in its segregated school maintained for Negroes during the 1954-1955 school year, and were not reemployed when the school system was integrated commencing in the fall of 1955, appeal from final order entered October 2, 1958, dismissing their complaint praying for declaratory judgment, an injunction, and damages.

Plaintiffs' cause of action is based upon their claim that the defendants denied them reemployment after integration solely because of their race or color, pursuant to a rule, practice, or custom of the Board of Education not to employ Negro teachers. Plaintiffs allege that such practice, policy, custom, or usage is in violation of their rights under the Constitution and laws of the United States, particularly the Equal Protection Clauses of the Fourteenth Amendment, and 42 U.S.C.A. §§ 1981, 1982, and 1983.

There is no dispute between the parties as to the applicability of the Fourteenth Amendment. The defendants admit that any rule, practice, or custom denying plaintiffs reemployment because of race or color would be discriminatory and in violation of plaintiffs' constitutional rights.

The trial court properly determined it had jurisdiction to consider the alleged violation of plaintiffs' rights protected by the Constitution and laws of the United States.

Appendix B

Prior to integration the Board operated six white elementary schools, a white junior high school, a white junior college, and a combined elementary and high school for Negro students known as the Lincoln School. During the school year 1954-1955, the Board employed 109 teachers. Ninety-eight white teachers served in the white schools. Eleven Negro teachers taught in the Lincoln School. Plaintiffs are seven of the eleven teachers employed in the Lincoln School.

The defendant Board, immediately after the decision of the Supreme Court in *Brown v. Board of Education*, 340 U. S. 483, commenced the necessary study looking toward the integration of its schools. After seeking the views of all races, an acceptable plan of integration was worked out and was placed in effect at the opening of the fall term of 1955. It is stipulated that, "the Board of Education of Moberly, Missouri, fairly and honestly and expeditiously went about and conducted the integration of the colored pupils and the white pupils in the Moberly School System prior to the filing of this suit." Because of this stipulation, it is unnecessary to set out the detailed evidence pertaining to the development of the integration plans. It should be said, however, that the original proposal contemplated the use of the Lincoln School as a unit of the integrated system, but this plan was abandoned when substantial objections thereto were made by both races. The Negroes opposed the retention of Lincoln as a voluntary segregated school, and no effort was made to retain the segregated school. The integration plan finally adopted called for the closing of the Lincoln School, and provided that pupils of all races would attend the integrated school in the district in which they lived.

As predicted by the Integration Committee, the plan adopted required fewer teachers than were needed under the former system. The Board's determination that the teaching staff could be reduced by eleven teachers is un-

challenged. At a Board meeting held on April 13, 1955, the Board decided not to renew the contracts of the eleven Negro teachers, and took similar action as to four white teachers. The teachers not employed were given statutory notice to that effect.

The Negro teachers, prior to integration, were employed by the School District which operated all of the Moberly schools. The Board, in its consideration of employment of teachers for the school year 1955-56, attached no significance to the fact that Lincoln School was closed, and did not decline reemployment to the Negro teachers upon the basis that the teaching positions which they had previously filled no longer existed. Instead, the Board endeavored to compare the qualifications of all teachers of both races in reaching its determination as to which teachers should be reemployed.

All witnesses offered on behalf of the Board denied that the Board had any rule, practice, or custom to refuse employment to Negro teachers because of their race, and also denied that plaintiffs were in any way discriminated against because of their race. The Board's position is that, at the April meeting and at all subsequent meetings at which vacancies were filled, the plaintiffs were given full and fair consideration for all teaching positions which they were certificated to fill; and the Board maintains that in each instance the teachers employed were better qualified than any of the plaintiffs to fill the teaching positions available.

Among the stipulations of the parties are the following:

> "For the purpose of this case, it is stipulated that the rule of the Board of Education of the Moberly School District which was in force at the time of integration, with respect to the basis upon which the Superintendent should recommend the employment of Teachers to the Board, and under which the

Board should employ the teachers, was a proper rule and was fair and just, said rule being as follows:

> 'All applications for employment in Moberly public schools must be in writing, and submitted to the Superintendent's office. All persons to be employed shall be recommended by the Superintendent and appointed by the Board of Education. Recommendations for appointment shall be made on the basis of merit, determined by Superintendent from the applicant's qualifications, training, experience, *personality and ability to fulfill the requirements of the position*. All employees must be physically fit to serve efficiently. Teachers are to file a health certificate with the Superintendent before assuming their duties.'

"(5) For the purpose of this case, it is stipulated that it was the duty of the Board of Education of the Moberly School District to employ in said district the teachers who, in their judgment, best complied with the rules relating to the employment of teachers hereinbefore referred to, and it is further duty of the Superintendent to make his recommendations to the Board on the same basis." [Emphasis ours.]

The emphasized portion of the rule just quoted covers the intangible elements to be considered in connection with the employment of the teachers. It is the application of this part of the rule that caused the difficulty in this case.

It is conceded that some of the Negro teachers had a greater number of college credits than some of the white teachers, and it is likewise true that some of the plaintiffs had more years of experience in teaching than some of the white teachers who were employed.

Appendix B

There is ample expert testimony to the effect that the intangibles included in the Board's rule are important elements to be considered in determining teacher qualifications. This court recognized the importance of intangibles in *Morris v. Williams*, 8 Cir., 149 F. 2d 703, where we held that intangibles may properly be considered in fixing teachers' salaries, and that differentials in salaries based upon valid intangibles are not violative of the Fourteenth Amendment. We stated (p. 708):

> "* * * Teaching is an art; and while skill in its practice can not be acquired without knowledge and experience, excellence does not depend upon these two factors alone. The processes of education involve leadership, and the success of the teacher depends not alone upon college degrees and length of service but also upon aptitude and the ability to excite interest and to arouse enthusiasm. * * *"

As heretofore stated, the plaintiffs stipulated as to the validity of the rule. Their real complaint is that it was not honestly and fairly applied.

We shall briefly state the facts relative to the method used by the Board in employing teachers for the school year commencing in the fall of 1955.

On April 11, 1955, Superintendent Henderson wrote each Board member a letter advising that the teaching staff should be reduced by eleven members. He set out in detail the training and experience of all the teachers, Negro and white, who were serving in the system. At a Board meeting on April 13, 1955, the qualifications of all the teachers of both races were discussed in the light of all of the elements of the Board's rule, including the intangibles. The Superintendent, upon the basis of the qualifications, recommended the teachers to be reemployed. The eleven Negro teachers were not included in the group thus

recommended. The Board at the same meeting also decided not to renew the contracts of four white teachers.

Superintendent Henderson testified at length at the trial, comparing the qualifications of the teachers reemployed with the Negro teachers on the basis of the whole rule of the Board. His testimony was corroborated as to elementary teachers by Mr. Brown who was supervisor of elementary teachers. Board members Wallace and Chamier testified that all teachers in the system were fairly considered for the positions available which they were qualified to teach; that the Board's whole rule, including intangibles, was considered in determining the qualifications; and that the Board, after a fair consideration of all the information before it, reemployed the teachers who in its judgment were best qualified. It is stipulated that the testimony of the remaining members of the Board, if called would be similar to that of Mr. Chamier. All of the defendants' witnesses denied that race was considered in the selection of the teachers. There is no direct evidence of any race prejudice or discrimination on the part of any Board member or school official. The only thing bordering on direct evidence as to discrimination is the statement of Mrs. Tymony, one of the Negro teachers, to the effect that Superintendent Henderson told her that the time would come when teachers would be employed on the basis of qualifications only; and a statement by another teacher, Mrs. Harris, that Supervisor Brown told her no colored teachers would be employed in Moberly for at least five years. Mr. Henderson denied making the statement attributed to him by Mrs. Tymony, and Mr. Brown denied making the statement above set out to Mrs. Harris. This conflict in testimony raised the question of credibility of witnesses for the trial court. In any event it is doubtful whether these isolated statements are substantial evidence of discrimination. The Board was the body that did the hiring.

Appendix B

The trial court in its unreported memorandum opinion held that no racial discrimination was established, and that the Board had fairly applied its rule in determining the teachers to be employed. The court states in part:

> "The testimony indicates that at this meeting the training, experience, personality and ability to fulfill the requirements of the position, including various intangibles, were discussed, and the testimony indicates that the Board's decision was based on its rule with respect to the employment of teachers. There is no testimony that there was any effort to get rid of the Negro teachers, either as individuals or as a group, because of race or color. The Board determined after a full and fair consideration of the matter that the white teachers in the system were better qualified than the Negro teachers and none of the Negro teachers were re-employed.
>
> * * *
>
> "* * * The individual qualifications, capabilities and abilities of each teacher must be considered, and human capabilities cannot be reduced to a mathematical formula. Intangible factors, such as personality, character, disposition, industry, adaptability, vitally affect the work of any teacher. The Superintendent's recommendation as to the various teachers was based upon information he obtained, his own observations, and observations of the principal and other teachers in responsible positions in the district. There was not the slightest inference in the testimony of these men that the race or color of any teacher entered into his recommendations. The court cannot substitute its judgement for that of the School Board or the Superintendent on the wisdom or expediency of a determination within the

Board's jurisdiction, but must rather determine if there exists sufficient factual basis that the Superintendent and Board's actions were arbitrary and discriminatory with respect to the Negro teachers.

* * *

"The Superintendent in his testimony dealt specifically with each of the plaintiffs, comparing them with the teachers who were hired, and gave in detail his analysis on each. * * *

* * *

"One's hindsight is often better than one's foresight, and while it does not enter into the decision in this matter, it is worthy of note that after the pupils in the system were integrated it was found that virtually without exception for the first half of the year 1955-56, the Negro pupils had trouble keeping up in their classes, but that during the second half of the year they were able to do so. It was the opinion of the Superintendent that this was due to the fact that they were not as well grounded in fundamentals as the white pupils with whom they were in classes. This fact supports the analysis of the plaintiffs by the Superintendent. * *

"Under the testimony, the facts and circumstances shown in the evidence, the court finds that the plaintiffs have failed to sustain the burden placed upon them, and this applies equally to each plaintiff, that the defendants had a practice, policy, rule or regulation of not hiring duly qualified applicants of the Negro race to teach in the public schools, but the testimony on the other hand shows that the Negro teachers were given the same consideration as the white applicants in the hiring of teachers. There is no evidence or circumstance which indi-

cates there was any discrimination by the defendants based solely on account of race or color."

The notice served upon the plaintiffs to the effect that their contracts would not be renewed was the notice contemplated by Section 163.090, 11 V.A.M.S. 83. Such statute reads in part:

> "* * * It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. * * *"

In interpreting this statute, the Supreme Court of Missouri in *Bergmann* v. *Board of Education*, ...Mo. ..., 230 S. W. 2d 714, holds that the statute does not change the legal effect of the teacher's contract, and does not "establish some sort of tenure." The court holds that the teacher's contract expires according to its terms, and that the notice contemplated by the statute can not be considered a discharge. Among other things the court states (p. 720):

> "* * * Notice under the statute that the teacher will not be re-employed for the succeeding year cannot, therefore, be construed as a discharge or dismissal from employment, since the only written contract of employment is in no wise affected by the notice. * * *
>
> "* * * On the admitted facts, plaintiffs Koerner and Prost had no contractual, preferential or statutory rights to continued employment. No contractual or statutory relationships were terminated by the notices. The existing contracts of employment were carried into effect, they were duly executed in all

> respects by the respective parties and they expired by lapse of time. There were no discharges, dismissals or termination of the employment of Koerner and Prost 'for unlawful reasons,' or in violation of constitutional rights, because there were no dismissals, discharges or terminations of employment by the defendants. * * *"

In the case we are considering, the employment contracts of the plaintiffs expired at the end of the 1954-1955 school year. Under Missouri law plaintiffs had no tenure rights. Plaintiffs' rights and obligations under their previously-existing contracts expired upon the termination of the contracts by lapse of time. A teacher upon expiration of his contract has neither contractual nor statutory rights to continued employment.

School boards are vested with wide discretion in matters affecting school management, including the employment of teachers, and a court may not interfere with the board's action unless the board has exercised its power in an unreasonable, arbitrary, capricious, or unlawful manner. *State ex rel. Wood* v. *Board of Education*, 357 Mo. 147, 206 S. W. 2d 566; *Morris* v. *Williams*, E. D. Ark., 59 F. Supp. 508, 510; 78 C. J. S. Schools and School Districts, 128, pages 920-923.

Plaintiffs' theory is that the Board could not possibly have come up with the result of refusing reemployment to the eleven Negro teachers honestly and in good faith upon the basis that in each instance a white teacher had superior qualifications for a position to which the Negro teacher was eligible, and that an inference must be drawn from such result that the Board in its decision was influenced by discriminatory racial considerations.

We concede that the result is unusual and somewhat startling. In the usual situation, considering the number

of applicants involved one would suppose that a fair application of standards would result in the re-employment of some of the Negro teachers. However, we cannot say with certainty here that there was no substantial evidence to support the trial court's finding and conclusion that the Board acted honestly pursuant to its rule in awarding the teacher contracts.

This case was tried to the court without a jury. We are required to give great weight to witness credibility determinations by the trial court. Rule 52(a), Federal Rules of Civil Procedure; *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 329. In the case last cited the Court states (p. 339):

> "'A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395. * * *"

In order to justify reversal in our present case we would have to determine that the trial court was not warranted in believing the positive testimony of Superintendent Henderson and the Board members to the effect that all applicants for teaching contracts were fully and fairly considered, pursuant to the Board's rule, and that no racial consideration entered into the matter of employment of teachers. Of course, the trial court was not compelled to believe this testimony, even though it was not directly disputed. On the other hand, the court, if convinced as to its truth, was not compelled to discredit it. The trial court had an opportunity to observe the witnesses as they testified and is in a far better position to determine questions of credibility of witnesses than this court upon the cold record. The trial court also had the opportunity to ob-

serve five of the plaintiffs on the witness stand and form some judgment with reference to the validity of the defendants' testimony with respect to the qualifications of such teachers.

We find no positive evidence that the Board was influenced by racial considerations in the matter of employing its teachers. Additionally, there are a number of factors tending to negative any racial prejudice on the part of the Board. The integration was completed promptly and in a manner satisfactory to all concerned. The wishes of the Negroes as to integration were fully considered and observed. Before integration the Negroes were paid salaries equal to those of the white teachers, and the Negro school was furnished with the same type of equipment and supplies as the white schools.

Each case of this type must be decided upon the basis of its own peculiar facts. We have carefully examined the entire record and find a mass of testimony tending to support the Board's determination that the white applicants' qualifications were superior to those of the Negro teachers with reference to the positions the Negro teachers were certificated to teach. The only evidence to the contrary on the qualifications issue was testimony by some of the Negro teachers in which they make some effort to compare their qualifications with those of the competing white teachers. In most instances the witnesses by their own testimony show that they were not familiar with the facts bearing upon the teaching skills of the competing teachers.

Our examination of the record satisfies us that there is substantial evidence to support the Board's determination as to teacher qualifications. The record discloses that experts in the field of education are not in agreement as to the best methods of evaluating teachers. Possibly, better methods might be available for evaluating teacher qualifications. The Board has a wide discretion in performing its

duties, including those relating to the employment of teachers. If the Board acted honestly and fairly in the exercise of its discretionary powers, the plaintiffs are in no position to complain at least so long as the action of the Board is not unreasonable, arbitrary, or motivated by racial consideration.

Plaintiffs claim that they at least should have had preferred consideration for the three vacancies they were qualified to fill which arose by reason of the Board's refusal to re-employ four white teachers at the April 13 Board meeting. The Board's action declining to renew the contracts of the four white teachers took place at the same meeting that similar action was taken as to plaintiffs. The Board has a wide discretion as to procedure to be followed in considering the renewal of contracts. The record shows that plaintiffs' applications were given full and fair consideration as to all vacancies which occurred on the teaching staff which they were qualified to fill.

It is our conclusion that there is substantial evidence to support the trial court's determination that the plaintiffs have failed to meet the burden of proving that the Board's action in failing to renew their teaching contracts results from racial discrimination.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

FILE COPY

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FILED
OCT 12 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 402.

NAOMI BROOKS et al.,
Petitioners,

vs.

THE SCHOOL DISTRICT OF THE CITY OF MOBERLY, MISSOURI et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE ISSUANCE OF WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE ISSUANCE OF WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Respondents submit the following statement of the case, to correct what they believe to be inaccuracies and omissions in petitioners' statement.

There was no dispute between the parties as to the applicability of the Fourteenth Amendment to the Constitution.

Respondents' answer admitted that a practice, policy, custom or usage of refusing to employ qualified public school teachers of the Negro race in the Moberly School District, if it had existed, would have been arbitrary, illegal, unlawful and violative of the rights of the petitioners (R. 12, Paragraph 8).

Prior to integration, the Moberly School District conducted six white elementary schools, a white junior high school, a white junior college, and a combined elementary and high school for Negro students. The Negro school was known as Lincoln School (R. 70, 345).

The system was rated AAA by the State of Missouri (R. 67, 224).

Since 1948, the colored teachers had received the same salaries as white teachers in comparable positions (R. 137, 155).

The supplies and equipment which were furnished to the Lincoln School were, in all respects, equal to those furnished the white schools (R. 155, 371-2).

At a pre-trial conference, the following stipulations were made and recorded:

> "(1) It is stipulated that the defendants may amend the answer by interlineation in the following respects: The corporate party defendant in the style and title, 'The Board of Education of the City of Moberly, Missouri, a corporation,' is hereby amended to read as follows: 'The School District of the City of Moberly, Missouri.'
>
> (2) For the purposes of this case it is stipulated that the Board of Education of Moberly, Missouri, fairly and honestly and expeditiously went about and conducted the integration of the colored pupils and the

white pupils in the Moberly School System prior to the filing of this suit.

(3) For the purpose of this case, it is stipulated that no member of the School Board nor any person connected with the Moberly School District attempted to influence the colored citizens of the Moberly School District to accept a voluntary, one-race colored school, to be conducted in the former colored school building, known as the Lincoln School building, in Moberly, Missouri.

(4) For the purpose of this case, it is stipulated that the rule of the Board of Education of the Moberly School District which was in force at the time of integration, with respect to the basis upon which the Superintendent should recommend the employment of teachers to the Board, and under which the Board should employ the teachers, was a proper rule and was fair and just, said rule being as follows:

> 'All applications for employment in Moberly public schools must be in writing, and submitted to the Superintendent's office. All persons to be employed shall be recommended by the Superintendent and appointed by the Board of Education. Recommendations for appointment shall be made on the basis of merit, determined by Superintendent from the applicants' qualifications, training, experience, personality and ability to fulfill the requirements of the position. All employees must be physically fit to serve efficiently. Teachers are to file a health certificate with the Superintendent before assuming their duties.'

(5) For the purpose of this case, it is stipulated that it was the duty of the Board of Education of the Moberly School District to employ in said district the teachers who, in their judgment, best complied with the rules relating to the employment of teachers hereinbefore referred to, and it is further duty of the Su-

perintendent to make his recommendations to the Board on the same basis.

(6) It is stipulated by plaintiff that it will not be necessary to have Canter, Owen and Bailey present at the trial." (Supp. Record 2-3).

The school system in Moberly had been conducted as a segregated system until the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, made segregation invalid (R. 346).

Promptly after that decision, the Moberly School Board, on June 9, 1954, appointed a committee to study and report the best method of integrating the schools (R. 155, 346-7). This committee, in its first report (Def. Ex. C-1) (R. 156), filed on December 8, 1954, suggested four plans. These plans were as follows (R. 348):

(1) Close Lincoln School (the Negro elementary and high school) and send the pupils to the school district in which they lived. District boundaries would remain as at present.

(2) Retain Lincoln School as an elementary unit for all pupils in a new district created from portions of Central, South Park and West Park. All elementary pupils would attend school in the district in which they lived.

(3) Close Lincoln School and redistrict all Moberly, changing boundary lines where necessary to more nearly equalize enrollments.

(4) Retain Lincoln School for Negro pupils who might choose to attend there.

The committee recommended the adoption of Plan Two (R. 156).

This recommendation was submitted to the citizens and taxpayers, and was quite vigorously opposed by both

white and Negro citizens (R. 58, 349-50). This plan would have required as many, or perhaps one or two more, teachers than under segregation (R. 158-9, 348-9).

Upon further study, the integration committee, in February, 1955, filed a supplemental report and recommended that the Lincoln School be closed, and that the boundaries of existing districts be changed to equalize the enrollment of both colored and white pupils in the various elementary schools which was plan three (Def. Ex. C-2) (159, 352).

It was found that by making this change, all the pupils, both colored and white, could be absorbed into the remaining elementary schools, without overcrowding and without increasing the pupil-teacher ratio beyond acceptable limits (R. 160-1, 354).

The pupil-teacher ratio in the white schools, prior to integration, was 1 to 24, and after the change, it would be 1 to 26.1, which was acceptable by all standards (R. 161, 354).

It became apparent, and the second integration report noted, that fewer teachers would be needed if this plan was adopted (R. 162, 113).

The plan recommended in the second integration report was adopted. Prior to the change, 109 teachers were needed in the system, and thereafter, only 98 were needed (R. 162-3). The Moberly School District had a rule governing the hiring of teachers, which had been in effect since 1944 (R. 166). This rule is set out in full in Paragraph 4 of the proceedings of the pre-trial conference.

The second integration report suggested that this rule be used in determining which teachers should be retained (DX. C-2, PX. 3a).

Teachers who were not to be retained in the system were required by law to be notified of that fact by April 15, 1955 (R. 355).

Two new members were elected to the Board in April of 1955, and the organization meeting of the Board, following the election, was held on April 6th (R. 356).

On April 11, 1955, the Superintendent wrote each board member, comparing, as to training and experience, the various teachers in the system, colored and white, who were available for the various positions remaining (Ptf. Ex. 3f) (R. 82, 91). On April 13th, the Board met with the Superintendent, and at that meeting the teachers in the system, both colored and white, were discussed, with a view of determining which teachers would not be reemployed. This discussion covered all elements of the rule—that is, training, experience, personality and ability to fulfill the requirements of the position, which included the various factors termed "intangibles" (R. 54, 60, 170, 357).

The testimony was that the Board made its decision in each instance on the basis of the whole rule, which included the intangible factors (R. 91-3, 166, 174, 239, 359). There was no effort to get rid of the Negro teachers, either as individuals or as a group, because of race or color (R. 55, 358, 359).

After a full discussion, the Board determined, upon the basis of the whole rule, that the white teachers in the system were better qualified than the Negro teachers, and none of the Negro teachers were reemployed. At this meeting on April 13th, the contracts of three white teachers were not renewed by the Board (R. 65, 165, 373). Under the established custom of the Board, these were

treated as vacancies (R. 374). When a vacancy occurred, it was the practice of the Superintendent to obtain as many applications as possible, and the vacancy was filled by the best qualified applicant (R. 59, 60, 165, 239, 359). This procedure was followed as to these three vacancies, and the Negro teachers certificated to teach in these three positions were considered as applicants for the positions (R. 56, 166, 239, 374). The testimony further showed that none of the seven available colored teachers were considered as meeting the standard which was desired in filling these three vacancies (R. 118, 368).

As to these three vacancies, and all subsequent vacancies, the testimony showed that the selections were made upon the basis of the whole rule (R. 91-3, 166, 239, 359), including intangible factors, and that the Negro teachers were considered as applicants where they were certificated to teach in the vacant positions (R. 56, 166, 239, 374).

The Superintendent was in each building once a week, and had knowledge of the comparative abilities of the teachers in the system, both colored and white (R. 77, 95, 102). The Elementary Supervisor, Mr. Brown, had a similar knowledge as to the elementary teachers (R. 77, 230, 330-1). The Elementary Supervisor spent at least half his time visiting class rooms (R. 77, 230). Plaintiff Tymony said that the Superintendent attended many of her programs (R. 274). Plaintiff Harris testified that the Elementary Supervisor, Brown, observed her classroom work twice a year for periods of an hour each (R. 330-1).

Under the segregated system, the Superintendent and the Elementary Supervisor had compared the Negro teachers only against Negro teachers, and the white teachers only against the white teachers (R. 121, 137, 232-3). Upon integration, they were faced for the first time with

the necessity of comparing the Negro teachers with the white teachers (R. 137).

The Elementary Supervisor had made reports on certain of the Negro teachers, particularly Mrs. Pitts. These reports were made on the sole basis of comparison with other Negro teachers, and were not ratings in comparison with white teachers (R. 120, 232-3, 384). Letters of recommendation for plaintiff Hughes, written by the Superintendent and Supervisor, were upon the assumption she was to teach in a segregated Negro school (R. 139, 227, 235).

The testimony was that the Negro teachers were considered as good as could be obtained under the segregated system (R. 78-9, 103, 148), and that there were not many Negro teachers available, under the segregated system (R. 104, 138). However, the testimony further showed that the colored teachers were not so well trained as the white teachers, or that they had not been able to absorb their training as well (R. 135-6, 175, 237).

Some of the Negro teachers had more hours of training than the white teachers. It was shown that beyond the hours necessary for certification, the importance of the hours depended on the courses taken. Appellants did not disclose what courses they had taken (R. 177-8, 248-9).

Some of the Negro teachers had more experience in teaching than the white teachers. It was shown that the value of experience depends on whether the experience was static or otherwise (R. 180, 238, 249). The experience of the Negro teachers had been static and largely detrimental rather than beneficial (R. 242).

It further appeared that the progress made by the colored pupils early after integration showed that the ability of the colored teachers was not so great as that of the

white teachers, and further, that their progress improved under the superior ability of the white teachers (R. 212-4, 237, 241).

The Superintendent, in his testimony, gave detailed comparisons of the available colored and white teachers, and fully outlined his reasons for recommending the white teachers as superior to the colored teachers (R. 176-209). With the Superintendent's conclusions, the Elementary Supervisor agreed (R. 240). Only the Superintendent and the Elementary Supervisor had knowledge of the abilities of both the colored and white teachers (R. 172). Neither white nor Negro principals were in position to make the comparisons (R. 172).

Admittedly, no written records were kept by the Superintendent or the Elementary Supervisor, concerning the various intangible factors which entered into the determination by them of the ability of the various teachers in the system. Personnel files on teachers were only started in the Moberly District in 1954-5 (R. 342). The testimony of Dr. Eli F. Mittler, an expert on teacher evaluation, was to the effect that no such written records were necessary, and that in a system the size of Moberly, these things could be well kept in the minds of the supervising officials (R. 253, 255-6). The Superintendent, the Elementary Supervisor and Dr. Mittler all testified that what were described as the intangible factors were of equal or greater importance in the success of a teacher than were training and experience (R. 167-8, 214, 238, 247-8).

The Appellants offered no evidence whatever to show that they possessed the important intangible attributes of a successful teacher in an equal or greater degree than did the white teachers, but were content to rely on their training and experience alone. They offered no evidence

to show that they were as well trained as the white teachers, except the bare record of their training, and no evidence to show that their years of experience had been beneficial.

ARGUMENT.

I.

The Decision Below in No Way Conflicts with Applicable Decisions of This Court.

(1) The Court of Appeals made its own independent evaluation of the evidence.

Petitioners seek certiorari upon the premise that the court of appeals failed to make its own independent evaluation of those evidentiary facts upon which the trial court based its judgment in rejecting petitioner's claim that their constitutional rights had been violated by the refusal of respondent school district to retain them in the Moberly School system.

The Court of Appeals made its own independent evaluation of the evidence. The court said:

> "We have carefully examined the entire record and find a mass of testimony tending to support the Board's determination that the white applicants' qualifications were superior to those of the Negro teachers with reference to the positions the Negro teachers were certificated to teach. The only evidence to the contrary on the qualifications issue was testimony by some of the Negro teachers in which they make some effort to compare their qualifications with those of the competing white teachers. In most instances the witnesses by their own testimony show that they were not familiar with the facts bearing upon the teaching skills of the competing teachers." (Petitioners' Petition, p. 32a, Appendix B).

(2) There was no disputed question of law.

Respondents conceded in their answer that if they had refused petitioners employment because of race or color, it would have been a violation of petitioners' constitutional rights (R. 12, Paragraph 8).

(3) There was no actual dispute as to the facts.

Petitioners admit this at Page 9 of their petition, when they say, "There is little dispute about the 'facts'."

To establish their case, petitioners proved their training and their years of experience. These were not disputed.

Petitioners concede the importance of what are known as the "intangible factors", in the evaluation of a teacher's ability (Petition, Page 15). They offered no evidence to show that their intangible factors equalled or exceeded those of the white teachers employed. Petitioners rested their case upon proof of their training and experience, and upon a supposition which they asked the court to make —that the fact that no one of them was reemployed was evidence that the refusal to reemploy arose from race or color.

Respondents made a detailed analysis of the intangible factors which affected the teaching ability of the Negro teachers in question, and a detailed comparison of those factors with the intangible factors of the white teachers who were employed (R. 176-209, 240). No evidence was offered by petitioners to rebut this.

(4) Certiorari should not be granted under the circumstances set out in the last three numbered divisions.

Certiorari is not granted to review evidence and discuss specific facts, or to review judgments based solely on questions of fact. *United States of America* v. *James J.*

Johnston, 268 U.S. 226, l.c. 227; *National Labor Relations Board* v. *Waterman S. S. Co.*, 309 U.S. 206, l.c. 208; *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U.S. 175, l.c. 178.

Appellate courts must take into consideration the opportunity which the trial judge had to see and hear the witnesses, and form his own appraisal of the weight to be given their testimony. Rule 52 of Federal Rules of Civil Procedure.

In its reexamination of evidence, where a claim is made of a denial of rights secured under the federal Constitution, the appraisal of the facts by this court is "based upon the uncontroverted facts, and where controversy exists, upon that testimony which the trial judge would reasonably conclude to be true." *Irving Feiner* v. *People of the State of New York*, 340 U.S. 315, l.c. 316; *Hoover and Allison Company* v. *Evatt*, 324 U.S. 652, l.c. 659; *Robert A. Watts* v. *State of Indiana*, 338 U.S. 49, l.c. 50-2.

Moreover, the decision which the petitioners attack is based on concurrent findings of the District Court and the Eighth Circuit Court of Appeals, and it should not be disturbed unless plainly without support.

General Talking Pictures Corporation v. *Western Electric Co., supra*, U.S. l.c. 178; *United States* v. *Chemical Foundation*, 272 U.S. 1, l.c. 14; *United States* v. *McGowan*, 290 U.S. 464, l.c. 477.

We submit that in a case where there was no disputed question of law, and where, by petitioners' own admission, little dispute as to the facts, certiorari should not issue.

(5) The judgment in the District Court and the affirmance in the Eighth Circuit Court of Appeals was justified by the evidence.

Petitioners contend that the District Court and the Court of Appeals were in error in finding that petitioners did not discharge the burden of proving that the Negro teachers were refused employment solely because of race or color.

Since there was no genuine dispute as to facts the sole question is whether the facts show discrimination. This brings us to a discussion of the evidence.

Without burdening this brief with repetition of the evidence which convinced those courts that no racial discrimination existed, which evidence is quite fully summarized in the opinion of those courts, we respectfully point out the following:

Following integration in the Moberly School District, which was conceded to have been fair, honest and expeditious (Supp. Record, Page 2, Paragraph 2), it was found that eleven fewer teachers would be needed after integration (R. 113, 162). The supplemental integration report recommended that teachers be employed in the district on the basis of the rule of hiring (P. Ex. 3-A, R. p. 45) which had existed in the Moberly School District since 1944 (R. 166). This rule was conceded to be fair and just (Supp. Record, Page 2, Paragraph 4). On April 11, 1955, the superintendent wrote each board member a letter, comparing the Negro and white teachers then in the system, on the basis of training and experience (R. 82-91). On April 13th; the board met for the purpose of deciding what teachers should be employed after integration. At that meeting, a full comparison was made of the Negro and white teachers, on the basis of training, experience

and their intangible qualities (R. 54, 140, 357). On the basis of the comparison and discussion held, the board decided not to reemploy the eleven Negro teachers, and not to reemploy three white teachers (R. 165). The failure to reemploy the three white teachers created three vacancies in the required teaching staff. It had always been the custom of the board, when a vacancy occurred, for the superintendent to procure as many applicants for the vacant positions as possible, and it had never been the custom of the board to fill vacancies at the same hiring meeting (R. 59, 90, 165, 239, 359). These three vacancies were treated in this manner (R. 165).

The Negro teachers were considered as applicants for employment both at the general hiring meeting for the three vacancies above mentioned and for all later vacancies which arose (R. 54, 60, 91-3, 166, 170, 239, 359). The testimony showed that the decision to employ each teacher employed after integration was made on the basis of all factors in the rule of hiring (R. 91-3, 166, 174, 239, 359).

There was no direct testimony of discrimination, and discrimination was denied by all of respondents' witnesses (R. 55, 358, 359). The prior record of respondents on salaries (R. 137, 155), speed of integration, fairness in integration procedures, supplies furnished (R. 155, 371-2), and the giving of colored citizens a voice in integration (R. 58, 347-50) established that respondents had no preconceived racial prejudice.

The Negro teachers were either not as well trained as the white teachers or had not absorbed their training as well (R. 135-6, 175, 237). The Negro teachers were furnished on the job training, but apparently did not absorb it as well as did the white teachers (R. 226, 236-7, 257-8). The intangible qualifications of the Negro teach-

ers were not as good as those of the white teachers (R. 176-209). The progress of the Negro pupils shortly after integration indicated that their teachers, these petitioners, under segregation, were not so able as were the white teachers; that their progress improved after integration further demonstrated this fact (R. 212-4, 237, 241). While some Negro teachers had more hours of training than did the white teachers, it was shown that the importance of hours of training depended upon the courses taken, and petitioners did not disclose what courses they had taken (R. 177-8). Some Negro teachers had more years of teaching experience than did some white teachers, but it was shown that the value of experience depends on whether the experience was static or otherwise (R. 180, 238, 249). It was shown that petitioners' experience had been static in nature, and harmful rather than beneficial (R. 242).

Petitioners offered no evidence to support their position except the bare record of their training and experience, and the fact that no Negroes were employed. They offered no single word of testimony on their intangible qualifications; they produced no witness to testify either concerning their intangible qualifications or their comparative ability with the white teachers; and they were unable to compare their teaching ability with the white teachers employed (R. 294-6, 316-17, 334, 340-1).

The system of teacher evaluation used in the Moberly School District was adequate. There was sufficient observation (R. 76, 77, 95, 96, 102, 230, 274, 330-1). Recordation of observation was not necessary in a system the size of respondents' system (R. 255-6). The same system of teacher evaluation was used for both colored and white teachers, and if it was inadequate, any injustice done petitioners because thereof arose not from discrimination, but because of a fault in the system.

The trial judge heard five petitioners testify, as well as respondents' witnesses, and was able to form an opinion not only of the weight to be given the testimony, but also an opinion as to the personality and intangible characteristics of petitioners. An example will be found in the trial judge's opinion (Appendix A, page 9a, of petitioners' petition), where he comments unfavorably upon the personality of the Negro teacher who had the most training. This illustrates the importance of Rule 52 of the Federal Rules of Civil Procedure.

There is no teacher tenure in Missouri. *Bergmann v. Board of Education*, (Mo.) 230 S.W.2d 714, l.c. 720.

Under segregation, the supply of Negro teachers was limited, and respondents received few applications from Negro teachers (R. 104, 138). Because of the scarce supply of Negro teachers, petitioners were considered the best available and reasonably satisfactory under segregation (R. 78-9, 148). The question which confronted respondents was not whether petitioners were reasonably satisfactory under segregation, but whether they were the best available teachers after integration. All comparisons and ratings of teachers in the Moberly system prior to integration had been on a basis of Negro against Negro and white against white (R. 120, 137, 232-3, 384). Recommendations made for petitioners after integration were upon the assumption that they were to teach in segregated schools (R. 139, 227, 234-5). After integration, the Negro school building was not used. It is now in use, for the reason that the North Park building, after integration, was found to be unsafe and had to be closed (R. 360).

There was no contradiction of any of the evidence above set out.

That none of the eleven Negro teachers were employed after integration is perhaps not so strange as it might seem at first glance. These Negro teachers grew up and were educated under segregation. As was said by this court in *Brown* v. *Board of Education of Topeka*, 374 U.S. 483, l.c. 494:

> "To separate them [the Negro pupils] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation ~~of a child~~ to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial (ly) integrated school system.' "

Unfortunately, it may well be that this was the very factor which rendered petitioners less effective than their white counterparts. Perhaps if petitioners had matured and been educated under integration, they would have been the equal or superior to the white teachers employed. As much as we may regret petitioners' prior handicaps, we must remember that it was the basic duty of the board of education to select the teachers who, in their opinion, were best qualified (Supp. Record, Page 3, Paragraph 5).

Because of the above mass of undisputed evidence produced by respondents in support of their position that failure to re-employ petitioners was because of the comparatively more able teachers available, and not because of race or color, and because of the almost total lack of evidence produced by petitioners to prove discrimination, and for the reasons above set out, we respectfully submit that the judgment and the affirmance of the judgment below were justified, and that certiorari should not issue. In the exercise of their hiring function, respondent board had a wide discretion, so long as the exercise was not arbitrary. *Allston* v. *School Board of Norfolk*, (C.C.A.) 112 F.2d 992; *Jason* v. *Summerfield*, (C.C.A.) 214 F.2d 273; *State ex rel.* v. *Board of Education*, 357 Mo. 147, 206 S.W.2d 566; *State ex rel. Hobby* v. *Disman*, (Mo. Supreme) 250 S.W.2d 137, l.c. 140; 47 Am. Jur., Page 325, Section 44; 78 C.J.S., Pages 920-3, Section 128.

During the course of this cause, petitioners have contended that respondents are estopped to contend that the qualifications of petitioners were affected by segregation. This equitable doctrine should not be invoked where it would adversely affect innocent third parties. To have selected an inferior teacher would have adversely affected the pupils, both colored and white, and these pupils were innocent third parties. To say that because an older generation furnished petitioners inferior educational opportunities under segregation, respondents are now estopped to say that they are not as well qualified as white teachers, would be to visit the sins of the fathers upon the children, both colored and white.

II.

This Is Not an Issue of Great Public Importance.

We concede that if respondents had taken the position that Negroes could be denied employment in the public schools because of race or color, a question of great public importance would be involved, no such issue was in this case. Respondents, from the beginning, conceded that this could not be done. The issue tried was whether petitioners were denied employment because of racial discrimination or whether, in the sound and honest discretion of respondents, they were not as well qualified as the white teachers. So we have here solely a question of fact. As the Circuit Court of Appeals said (Petitioners' Petition, Appendix B, Page 32a), "Each case of this type must be decided upon the basis of its own peculiar facts". This case can form no precedent for a later case with a different set of facts. Indeed, the likelihood of another case arising with the same facts is quite remote. Therefore, this case is of no great public importance. It could only be of importance to the Negro teaching profession if this or some other court were willing to rule that Negro teachers must be employed in public schools, regardless of whether better qualified white teachers are available. This no court will rule. This case is important only to the parties involved.

CONCLUSION.

For the reasons hereinabove set out, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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